No. 85-2079

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, *et al.*,
Petitioners,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE RESPONDENT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States ("Chamber") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the Respondent pursuant to Rule 36.3 of the Rules of this Court. Counsel for the Respondent has consented to the filing of this brief,[1] but counsel for the Petitioners has declined to consent.

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[1] The consent letter has been filed with the Clerk of this Court.

The Chamber is the nation's largest federation of businesses, representing more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on business issues before the courts on all levels. In this capacity, the Chamber has participated as *amicus curiae* in a wide spectrum of labor litigation.[2]

In the instant case, the Petitioners ask this Court to hold that federal district courts have jurisdiction under §§ 502 and 515 of the Employee Retirement Income Security Act ("ERISA") to determine the obligations of parties to a collective bargaining relationship whose contract has expired. Section 515 requires employers who are "obligated to make contributions to a multiemployer plan under the terms of a collectively bargained agreement" to make those contractually mandated contributions. Petitioners argue that this provision should be construed to obligate employers to continue making contributions after the contract has expired, until bargaining in good faith to impasse about any change in contribution level. This construction of § 515, read together with ERISA's jurisdictional grant in § 502, would empower federal district courts to adjudicate any claim of failure to bargain in good faith to impasse before reducing or ceasing contributions. While admitting that adjudicating such claims would force the federal courts to interpret the post-contract bargaining obligations imposed by § 8(a)(5) of the National Labor Relations Act, the Petitioners argue that this would be "no great imposition on federal labor policy."[3]

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[2] *See, e.g., Caterpillar, Inc.* v. *Williams*, 55 U.S.L.W. 4804 (U.S. June 9, 1987); *Fort Halifax Packing Co.* v. *Coyne*, 55 U.S.L.W. 4699 (U.S. June 1, 1987); *NLRB* v. *United Food & Commercial Workers Union, Local 23, cert. granted*, 107 S. Ct. 871 (1987) (No. 86-594).

[3] *See* Petition for Writ of *Certiorari* at 11.

To the contrary, the Chamber fears that the holding Petitioners seek would lead to destruction of uniformity in labor law principles and embroil the federal courts in the collective bargaining process. Empowering the more than 500 federal district court judges to implement their individual interpretations of post-contract obligations would undermine Congress's objective in creating a single, centralized agency with significant expertise to regulate parties' rights and duties in ongoing bargaining relationships. Congress did not intend to offer litigants a choice between the Board and the courts in disputes involving bargaining obligations solely because they may affect benefit contributions. Nor did Congress intend to subject employers engaged in post-contract negotiations to the spectre of successive lawsuits in federal court challenging their bargaining tactics.

Because the Chamber is well-suited to present to the Court the ramifications for businesses of this dramatic expansion of federal district court jurisdiction, it submits this brief, and urges the Court to affirm the decision of the Ninth Circuit below.

Respectfully submitted,

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July 10, 1987

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE RESPONDENT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers the Court to its attached Motion for Leave to File Brief *Amicus Curiae* for a statement of its interest in this proceeding.

INTRODUCTION

This case of statutory construction requires the Court to examine the scope of federal court jurisdiction under §§ 502 and 515 of the Employee Retirement Income Secu-

rity Act ("ERISA").[1] At issue is the meaning of § 515's phrase "obligated to make contributions . . . under the terms of a collectively bargained agreement." Petitioners claim that this phrase requires employers to continue making trust fund contributions after the contract requiring these contributions has expired, until bargaining in good faith to impasse about any change in contribution level. In other words, Petitioners argue that § 515 imposes a duty on employers to comply with § 8(a)(5) of the National Labor Relations Act ("NLRA") with respect to their benefit plan contributions. This construction of § 515, read together with ERISA's jurisdictional grant in § 502, would empower federal courts to adjudicate unfair labor practice claims. Respondent, on the other hand, claims that § 515 applies only to contribution obligations imposed by existing contracts, and any § 8(a)(5) obligation to continue contributions must be adjudicated and enforced by the National Labor Relations Board ("NLRB").

In the decision below, the Ninth Circuit agreed with the Respondent and held that federal courts have no jurisdiction under §§ 502 and 515 of ERISA to determine the scope of an employer's obligation to contribute to a benefit plan after the collective bargaining agreement has

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[1] § 502 of ERISA, 29 U.S.C. § 1132, provides in relevant part:

(e) Jurisdiction

(1) . . . [T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fidiciary. . . .

§ 515 of ERISA, 29 U.S.C. § 1145, provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

expired.[2] Emphasizing the exclusivity of NLRB jurisdiction whenever a dispute "involves adjudicating conduct which is arguably within the compass of § 7 or § 8 of the NLRA,"[3] the court found no reason to create an exception to this exclusive jurisdiction for suits seeking post-expiration benefit contributions.[4]

Petitioners now ask this Court to hold that NLRA-based contribution obligations are independently enforceable in federal court under ERISA. The Chamber urges the Court to reject the Fund's invitation to rewrite the law and give federal courts jurisdiction to rule on unfair

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[2] *Laborers Health & Welfare Trust Fund for Northern California* v. *Advanced Lightweight Concrete Co.*, 779 F.2d 497 (9th Cir. 1985). Three other circuits support the Ninth Circuit's view. *See New Bedford Fisherman's Welfare Fund* v. *Baltic Enterprises, Inc.*, 813 F.2d 503 (1st Cir. 1987); *Moldovan* v. *Great Atlantic & Pacific Tea Co.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds* v. *Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986).

[3] 779 F.2d at 504 (internal quotation marks and citation omitted).

[4] *Id.* at 505. The court declined to hold that the use of the words "obligated to make contributions" in § 515 evinced a congressional intent to incorporate the broad definition of the similar phrase found in § 4212(a), a definition applicable solely for the purposes of determining withdrawal liability. Section 4212(a), 29 U.S.C. § 1392(a), defines "obligation to contribute," for purposes of withdrawal liability only, as: "an obligation to contribute arising (1) under one or more collective bargaining (or related) agreements, or (2) *as a result of a duty under applicable labor-management relations law*, but does not include an obligation to . . . pay delinquent contributions" (emphasis added).

The court also declined to expand the meaning of the phrase "under the terms of a collectively bargained agreement" to include the terms of an *expired* collective bargaining agreement, finding it unreasonable to believe that Congress would use such an "ambiguous, metaphysical concept" in § 515 to define an extra-contractual obligation "when it had used a crystal clear definition elsewhere in the same act," in § 4212. 779 F.2d at 502, *quoting Mo-Kan Teamsters Pension Fund* v. *Botsford Ready Mix Co.*, 605 F. Supp. 1441, 1445 (W.D. Mo. 1985).

labor practices. In addition to supporting Advanced Lightweight Concrete's arguments on statutory construction and congressional intent with respect to § 4212,[5] the Chamber urges the Court to consider the inherent danger in creating more than 500 miniature National Labor Relations Boards by empowering federal district court judges to rule on unfair labor practice claims and establish the scope of post-contract obligations. Congress did not intend, nor should this Court countenance, such a result.

ARGUMENT

I. ALLOWING FEDERAL COURTS TO DETERMINE THE SCOPE OF POST-CONTRACT BARGAINING OBLIGATIONS WOULD DESTROY UNIFORMITY IN LABOR POLICY AND EMBROIL THE JUDICIARY IN THE COLLECTIVE BARGAINING PROCESS.

A. Determining the Scope of Post-contract Obligations is a Matter of Federal Labor Law.

Section 515 of ERISA imposes a duty upon employers "obligated to make contributions to a multiemployer plan . . . *under the terms of a collectively bargained agreement*" to make those contributions. After the collective bargaining agreement mandating contributions expires, § 515 no longer applies. Freed of any contractual obligation, employers have only such duties as the National Labor Relations Act imposes on them as parties to an ongoing bargaining relationship. Section 8(a)(5) of the NLRA requires employers to bargain in good faith to impasse over the terms and conditions of employment which constitute mandatory subjects of bargaining before unilaterally implementing any changes in them.[6] Since benefit contributions are a mandatory subject of bargaining,[7] unilaterally terminating them prior to impasse constitutes an unfair labor practice, adjudication of which falls within the exclusive jurisdiction of the National Labor Relations Board.

[5] *See* n.4, *supra*.

[6] *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 209-10 (1964); *NLRB* v. *Katz*, 369 U.S. 736, 742-43 (1962).

There is no conflict or overlap between this exclusive Board jurisdiction and ERISA's scheme for the collection of delinquent benefit contributions. ERISA empowers federal courts to enforce existing agreements to contribute, and the NLRA empowers the Board to rule on the parties' panoply of obligations after an agreement expires.

The underlying question to be determined by whichever tribunal ultimately presides over this case is whether the employer violated its duty to continue benefit contributions after the contract expired, without bargaining in good faith to impasse. Both Petitioners and the United States as *amicus curiae* agree that this will entail a determination of whether the company violated § 8(a)(5).[8] That determination is unquestionably a matter of interpreting and applying federal labor law, a task which the NLRB was given exclusive jurisdiction to perform.

B. Congress Empowered the Board to be the Exclusive Forum to Interpret Federal Labor Law, and the Board has Developed Significant Expertise in Administering the NLRA.

Congress and this Court has recognized the importance of reserving to a single forum the task of interpreting NLRA-based obligations. Beyond "merely lay[ing] down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties," the Act

[7] *See Cascade Painting Co.*, 277 N.L.R.B. No. 103, 121 L.R.R.M. (BNA) 1008 (1985); *Buck Brown Contracting Co.*, 272 N.L.R.B. 951 (1984); *Cauthorne Trucking*, 256 N.L.R.B. 721 (1981), *enf'd in relevant part*, 691 F.2d 1023 (D.C. Cir. 1982).

[8] *See* Brief of Petitioners at 6, 12-13, 26-27; Petition for Writ of *Certiorari* at 11-12, 16; Brief for the United States as *Amicus Curiae* in support of the Petition for *Certiorari* at 6-7.

"confide[d] primary interpretation and application of its rules to a specific and specifically constituted tribunal," the Board. *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490-91 (1953). This delegation reflected Congress's decision that centralized administration was necessary to ensure uniform application of the Act's provisions. *Id.*

Consistent with these Congressional determinations, this Court has recognized repeatedly the "overriding interest in a uniform nationwide interpretation of the federal [labor] statute." *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519, 528 (1979). The statute's objectives would be defeated, the Court has stressed, "if state and federal courts were free, without limitation, to exercise jurisdiction over activities that are subject to regulation by the . . . Board." *Id.*, 440 U.S. at 527-28.[9]

Accordingly, the Board is the primary tribunal charged with interpreting and enforcing federal labor law. In this capacity, the Board has ruled on countless unfair labor practice claims alleging violation of the duty to bargain, including those alleging termination of benefit fund contributions without bargaining in good faith to impasse.[10] Indeed, the Board has developed a significant body of law on the duty to bargain. Since initially developing basic principles and tests consistent with the Act's language, the Board has been faced with innumerable

[9] *See also Metropolitan Life Ins. Co.* v. *Massachusetts*, 105 S. Ct. 2380, 2394 n.26 (1985) (Congress chose to "creat[e] an administrative agency in charge of creating detailed rules to implement the Act, rather than having [it] enforced and interpreted by the state or federal courts").

[10] *See, e.g., Arrow Sash & Door Co.*, 281 N.L.R.B. No. 149, 1986-87 NLRB Dec. (CCH) ¶ 18,447 (1986); *Buck Brown Contracting Co.*, 272 N.L.R.B. 951 (1984); *Auto Fast Freight, Inc.*, 272 N.L.R.B. 561 (1984).

questions of interpretation, *e.g.*, in determining what conduct constitutes a waiver of bargaining rights[11] or a failure to bargain in good faith,[12] refining its definition of impasse and the circumstances in which it occurs,[13] and exploring the range of parties' rights and obligations once impasse is reached.[14] Interpretations in each of these areas carry great weight in the determination of whether an employer that terminates benefit contributions has violated its § 8(a)(5) duties. The Board works to resolve these questions using the experience it has developed through day-to-day administration of the statute,[15] and looking to its body of prior decisions for guidance and continuity. This is what Congress intended when it gave the Board "the primary responsibility of marking out the scope of the statutory language and of

[11] *See, e.g., General Tire & Rubber Co.*, 274 N.L.R.B. 591 (1985) (contract clause providing that certain benefits "shall be provided for 90 days following termination" of the agreement was not "clear and unmistakable waiver" of the union's right to bargain over the discontinuance of those benefits after the 90-day period).

[12] *See, e.g., Hamady Bros. Food Markets, Inc.*, 275 N.L.R.B. 1335 (1985) (making regressive proposals in light of changes in the economy does not constitute failure to bargain in good faith, absent other indicia); *Rescar, Inc.*, 274 N.L.R.B. 1 (1985) (same).

[13] *See, e.g., J.D. Lunsford Plumbing, Heating & Air Conditioning, Inc.*, 254 N.L.R.B. 1360 (1981) (continued bargaining is not always inconsistent with impasse).

[14] *See, e.g., Stone Boat Yard*, 264 N.L.R.B. 981, 982 & n.3, *enf'd*, 715 F.2d 441 (9th Cir. 1983) (employer must provide union with written copy of proposed contract changes prior to unilaterally implementing them).

[15] *See NLRB* v. *Hearst Publications*, 322 U.S. 111, 130-31 (1944) ("Everyday experience in the administration of the statute gives [the Board] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers.").

the statutory duty to bargain." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979).

C. Reversing the Ninth Circuit's Decision in this Case Would Lead to Destruction of Uniformity in Labor Law Principles and Involve the Federal Courts in the Collective Bargaining Process.

The Petitioners in this case seek to empower the numerous federal district courts to implement their own interpretations of the scope of post-contract obligations. Such a holding could result in a body of law that varies markedly from court to court. An element held to be critical to a finding of impasse by one court could be ignored by another. Conduct that one court considered to constitute a waiver of bargaining rights could be held not to do so by another.

This patch-work of law could lead to anomalous results. For example, litigation initiated by trustees to recover post-expiration contributions from several companies that had participated in multiemployer bargaining could produce a holding by one court that negotiations had *not* reached impasse (thus termination of contributions constituted an unfair labor practice), and by another court that bargaining *had* reached impasse (thus termination of contributions did not constitute an unfair labor practice).[16] The same conduct between the same parties simultaneously would be held to violate the NLRA, and not violate the NLRA.[17] Congress could not have intended to create such incongruity in the enforcement of either ERISA or the NLRA.

[16] Presumably, if the construction proposed by Petitioners were to be adopted, trustees' fiduciary duties would require them henceforth to keep abreast of the developing state of the law in each jurisdiction in order to choose the most favorable forum.

[17] As this Court stressed in *Garner* v. *Teamsters Union*, "[a] multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." 346 U.S. at 490-91.

Reversing the Ninth Circuit's decision also would threaten continuous federal court interference in the collective bargaining process. The Petitioners seek a construction of ERISA that would extend federal district court jurisdiction beyond those actions brought against employers for violating their contribution obligation "*under the terms of a collectively bargained agreement*," to include actions brought for violation of any obligation to contribute "*arising as a result of a duty under applicable labor-management relations law.*" Such expansive jurisdiction would license federal courts to adjudicate allegations that any aspect of an employer's conduct in ceasing or reducing post-contract contributions violated its duties under the National Labor Relations Act.

Under this construction, during the course of bargaining after contract expiration, the trustees of a plan could bring successive lawsuits in federal court alleging that an employer had violated various aspects of its bargaining obligations. One suit could challenge the employer's determination that the union had waived its right to bargain over cessation of plan contributions; a subsequent suit could allege that the employer was not bargaining in good faith; another suit could challenge the employer's determination that the union was not bargaining in good faith; yet another suit could challenge the employer's determination that impasse had been reached. Thus, under the proposed extension of § 515, every dispute about the parties' bargaining obligations with respect to benefit contributions could be brought before a federal district court judge.

Federal court intrusion into the ongoing bargaining process would be directly antithetical to the goals and procedures of the NLRA. Petitioners' allegation that

access to federal court in such cases constitutes an independent federal remedy consistent with the NLRA [18] cannot withstand scrutiny. The Board was created in order to develop in one, centralized agency a specialized expertise in interpreting and applying all aspects of the NLRA. District court judges, with little or no experience in the intricacies of bargaining relationships and the Act's restrictions, are ill-equipped to step into this arena. In disputes such as the instant case, it is the Board's function to make an underlying determination as to whether, under federal labor law, any contributions are in fact due and owing.[19] If so, the Board will order payment, and, in some cases, a return to the bargaining table. In all likelihood, the Board will have before it questions about other aspects of the employer's post-contract obligations as well. If necessary, the Board's order can be reviewed by a court. But judicial intrusion before this stage is wholly inconsistent with the NLRA.

Moreover, such judicial invasion cannot be likened to federal court adjudication of impasse questions for purposes of determining whether and when an employer's contribution obligation *permanently* ceased in withdrawal cases.[20] That one-time determination of the details of cessation of the contribution obligation does not enmesh the courts in establishing parties' continuing NLRA-based duties.[21] Judicial regulation of the rights and obligations of parties in ongoing bargaining relationships is substan-

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[18] *See* Brief of Petitioners at 26.

[19] Despite Petitioners' characterization of such suits, they are not simply collection actions, as the fact of liability has not yet been established.

[20] *See* Brief of Petitioners at 35-37.

[21] Indeed, in such cases, the court determines not whether the company has committed an unfair labor practice, but rather, whether and when the company has withdrawn from the plan, incurring withdrawal liability.

tively different from judicial determination of withdrawal liability obligations after a bargaining relationship has terminated permanently. Thus, contrary to the Petitioners' allegation that, in view of federal courts' role in withdrawal liability determinations, "it should be no great imposition on federal labor policy" to grant them jurisdiction in suits alleging post-contract delinquency,[22] such an expansion of jurisdiction would be an imposition of great magnitude.

The damage to federal labor policy that would flow from allowing district courts to establish bargaining obligations would far outweigh any potential harm that could result to multiemployer plans from litigating this narrow category of cases before the Board. As Petitioners indicate, "most collection actions are brought to enforce an existing collective bargaining agreement." [23] By contrast, the ruling Petitioners seek would be limited in application to litigation against employers whose contractual obligations have expired, but who allegedly have violated their NLRA-based duties. Confining the delineation of such duties to the Board would have a small impact on the viability of multiemployer plans, but would be a critical step in preserving uniformity in national labor policy.

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[22] *See* Petition for Writ of *Certiorari* at 11.

[23] *See* Brief of Petitioners at 6.

CONCLUSION

For the reasons stated in the foregoing brief and in the Brief of the Respondent, the Chamber urges the Court to affirm the decision of the Ninth Circuit below.

Respectfully submitted,

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